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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 263.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

against

CLARENCE BEZUE,

Respondent.

RESPONDENT'S BRIEF.

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Counsel for Respondent.

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

AGAINST

CLARENCE BEZUE,
Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, CLARENCE BEZUE.

I.

The Opinions of the Courts Below.

The opinions of the New York Court of Appeals are reported in *Bezue* v. *The New York, New Haven and Hartford Railroad Company*, 256 N. Y. 427, decided June 2, 1931 (R., 489-495).

The memorandum decision of the Appellate Division, Second Department, is reported in 232 N. Y. App. Div. 840 (R., 487).

The trial court wrote no opinion after the verdict, (R., 482) but in disposing of the motion to dismiss the complaint stated orally, upon the question as to whether

or not plaintiff was engaged in interstate transportation or work so closely related to it as to be a part of it, that:

> "Upon the authority of Law against the Illinois Central Railroad Company, 208 Federal Reporter, 869 (cited and not disapproved in the case of the *Industrial Accident Commission of the State of California* against *Davis*, 259 U. S. 182). I hold that the engine was an instrumentality of interstate commerce, that it was not withdrawn from the service but that roundhouse repairs were being made and that during that time it continued in the service and was an instrumentality of interstate commerce, and the plaintiff at the time was engaged in interstate commerce work upon an instrumentality of interstate commerce that had not been permanently withdrawn from the service" (R., 244-245).

II.

Jurisdiction of This Court.

Respondent admits the jurisdiction of the court in this case.

III.

Statement of the Case.

This is an action for personal injuries brought pursuant to the Federal Employers' Liability Act (Act of Cong. April 22, 1908 c. 149, Sec. 1, 35 Stat. 65, and Act of April 5, 1910, c. 143, Sec. 1, 36 Stat. 291). The issues came on for trial before a Judge and a jury in the Supreme Court, Putnam County, New York, in September and October, 1930, and resulted in a verdict in favor of the plaintiff and against the defendant for

$60,000 (R., 1, 352-355). The Appellate Division of the Supreme Court, Second Department, reversed the judgment and order and granted a new trial, unless plaintiff stipulated to reduce the verdict to the sum of $50,000, otherwise the judgment as modified and the order were unanimously affirmed. 232 N. Y. App. Div. 840. Plaintiff so stipulated (R., 1, 486). Thereafter petitioner appealed as of right to the Court of Appeals from the judgment in favor of the plaintiff, and also from the order of the Appellate Division modifying and reducing the judgment (R., 483, 484). The Court of Appeals affirmed the said judgment, and made a judgment and order of affirmance dated June the 3rd, 1931 (R., 495, 496).

The majority opinion of the Court of Appeals (R., 489-493) held in substance that the respondent was engaged in *an interstate transportation plant service*, and stated that respondent was *"engaged in interstate transporation or in work so closely related to it as to be practically a part of it"* (R., 492).

And that therefore it was

> *"unnecessary to determine whether at the time of the accident the locomotive being repaired had been so withdrawn from service that it was not in use in interstate commerce."*
>
> "There was no conflict in the evidence in regard to the services performed by the respondent. The Trial Court, therefore, properly decided as a matter of law that the respondent was covered by the act" (R., 493).

The dissenting opinion held in effect that the locomotive in question was withdrawn from commerce, and that the character of respondent's general employment was immaterial, and that respondent therefore was not engaged in interstate transportation or work so closely related as to be a part of it (R., 493).

The respondent, solely for the purpose of correcting *omissions in petitioner's statement of the facts,* will now briefly state such facts as respondent considers essential to the consideration of the case.

Facts.

Respondent at the time in question was employed by the petitioner as a member of an unskilled labor gang (R., 149, 216) at petitioner's maintenance roundhouse and interstate engine terminal at Maybrook, N. Y. (R., 149) where minor servicing locomotive repairs were made and boilers were washed on interstate engines (R., 188-189).

The attention of the Court is here called to the fact that when this type of interstate locomotives were withdrawn from service for general repairs and overhauling, such repairs were never made at Maybrook, but the *locomotive was then, and then only, put out of service* and deadheaded to Readville, Mass., where it was dismantled and completely repaired; and then after it was inspected, it was first placed in storage before being returned to service (R., 189, 213), and such locomotive was never withdrawn from interstate transportation until it was thus withdrawn from interstate transportation for the purpose of sending it to petitioner's *"back-shop"* at Readville, Mass., where these heavy repairs were made on this type of engine.

It is very important to note that about six months before this accident, this particular engine, in connection with which respondent had been working for about two or three hours before he was injured, was taken out of service and sent to petitioner's *"back-shop"* at Readville, Mass., to be completely repaired and overhauled, and after it was inspected and stored it was not returned to service until March 27, 1929, about five months before the accident (R., 363), and from that

time on up to the time of the accident it was never taken out of service, but was merely sent into this Maybrook round house terminal for its customary boiler washes and incidental repairs upon three occasions, to wit: May 3rd, June 10th and July 17th, and at the time of the accident was undergoing one of its boiler washes and the incidental repairs connected therewith (R., 458-460-464-468).

This Maybrook roundhouse was located only about seventy miles west of the New York-Connecticut State line (R., 244) and Maybrook was the westerly terminal of the road, and in order to do its exclusive interstate work, it day in and day out was running across the New York-Connecticut State line to work upon and get upon the main line, except when it was in at Maybrook for maintenance repairs and washes (R., 244).

Furthermore it appears that *very frequently heavier maintenance repairs* were made at Maybrook during boiler washes than the work that was being done upon this locomotive at this time (R., 265).

Most of the time, respondent operated a small portable electric truck with a crane attached thereon in working on and around the defendant's "hot" interstate locomotives in this roundhouse terminal, and he also made himself generally useful in and about this interstate roundhouse and terminal, either with the truck and crane or in person, in aiding or personally in general maintenance work, of oiling locomotives; pulling down grease boxes, getting grease and greasing locomotives; adjusting couplers; adjusting brake shoes; pressure tanks; taking off and putting on locomotive drive shafts; keeping locomotives continually in service in interstate transportation; greasing collars; fixing draw bars; adjusting pumps and pilots; removing, replacing and adjusting locomotive air compressors, locomotive brackets and water pumps; bringing material for hot interstate engines; removing and

replacing pistons from cylinders of engines (R., 106-111; 142-149; 178-179) and any and all unskilled labor work required in and about the petitioner's interstate locomotives in this roundhouse.

These various jobs, whatever might be requested at any time, required from twenty minutes to a few hours (R., 111).

Keeping defendant's "hot" active locomotives in good maintenance and repair (R., 109). This was his regular unassigned work day in and day out (R., 109) and he was so employed up to and at the very moment of the accident.

Unskilled labor also was used in rolling wheels, the identical job plaintiff was assisting in doing when injured; putting things in position for mechanics and running the turn-table (R., 261).

The record shows beyond dispute that practically all of the engines coming in and out of that roundhouse were used exclusively in interstate commerce; a very few in mixed commerce, and only one or two in intrastate commerce (One passenger train daily from Maybrook, N. Y. to Poughkeepsie, N. Y.) (R., 109, 207, 210-213) and Plaintiff's Exhibits 15A, 15B, 16, R., 366-446).

The particular engine involved in plaintiff's accident was used exclusively for interstate transportation from September 3, 1927, or two years before plaintiff was injured, (See stipulation R., 224-226) and its actual interstate movement was only interrupted nine days before plaintiff was injured for its regular U. S. statutory 30-day boiler wash (R., 262, 263) and this particular engine, involved in respondent's accident, immediately after its boiler wash and incidental repairs were concluded (2 days after respondent's injury) continued its exclusive interstate commerce work up to the date of the trial.

Plaintiff worked day in and day out on "hot" interstate engines—or "live" engines—ready for use and actually used immediately thereafter which was admitted by the petitioner in its brief herein in the N. Y. Appellate Division, pp. 20-21.

Upon all this uncontroverted evidence the respondent conclusively established that at the time of his injury he was engaged as an unskilled laborer at petitioner's maintenance interstate transportation roundhouse in work so closely related to interstate transportation as to be a part of it.

The engine involved in plaintiff's injury was one of the petitioner's Santa Fe type mountain engines used exclusively in its interstate transportation from Maybrook, N. Y. over the mountains to Connecticut and Massachusetts (R., 208, 212). This Santa Fe type was known as 2-10-2, and the particular engine was numbered 3221, and by stipulation herein the petitioner concedes that it was used exclusively for interstate transportation for two years before the plaintiff was injured (R., 224-226) and it is not suggested that it was ever used by defendant for any purpose, except interstate transportation, from the time that it was purchased by petitioner, not only up to the time of plaintiff's injury but up to the trial (R., 367 to 446). It was one of the defendant's interstate transportation engines which came into this roundhouse for maintenance every day (R., 261).

The Federal Statute requires locomotives to undergo a boiler wash every 30 days (R., 209). This particular locomotive had undergone such washes on November 14, 1927; Jan. 23, 1928; Feb. 25, 1928; April 2, 1928; May 8, 1928; June 10, 1928; July 17, 1928; Sept. 5, 1928; Oct. 11, 1928; Nov. 26, 1928; May 3, 1929; June

10, 1929; July 17, 1929, and the one at the time of the accident, Aug. 24, 1929 (R., 263) while being used only in the Maybrook, N. Y.-Connecticut freight service.

A boiler wash takes from 3 to 6 days or more (R., 188). A boiler wash is never made alone but always in conjunction with temporary and minor repairs (R., 188-189) *and at the time of the accident the moving of the wheels was incident to the boiler wash period* (R., 264).

The plaintiff upon this evidence, thus established beyond all dispute both of the following propositions:

(A) Respondent's general work and his work at the time of the injury was that of an unskilled laborer at defendant's maintenance roundhouse and engine terminal at Maybrook, N. Y., where petitioner maintained and repaired, while still in service, its interstate commerce engines; and that therefore the respondent at the time of his injury was necessarily engaged in work so closely related to interstate transportation as to be a part of it.

(B) That at the time the respondent was injured he was engaged in maintaining in efficient condition for effective service one of petitioner's engines exclusively engaged in interstate transportation, which was still in service, and had *not* been withdrawn from service to be deadheaded to petitioner's "back-shop" at Readville, Mass.

Therefore, by reason of the undisputed facts herein, as stated succinctly above under A and B, the respondent at the time of his injury was engaged in work so closely related to interstate transportation as to be a part of it and the Federal Employers' Liability Act applied to his case.

ARGUMENT.

POINT A.

All the facts in this case upon which the question as to whether or not respondent was engaged in work so closely related to interstate transportation as to be a part of it, are undisputed, and thus only a question of law was and is presented, and it appearing conclusively that respondent was injured while so engaged it is immaterial upon which ground it is so held.

The record shows that the trial court held upon this undisputed evidence, as matter of law, that the respondent at the time he was injured was engaged in work so closely related to interstate transportation as to constitute a part of it, and *based this ruling* upon the case of *Law* v. *Illinois Central R. R. Co.*, 208 Fed. 869 (cited and not disapproved in *Industrial Accident Commission* v. *Davis*, 259 U. S. 182) and held that the engine upon which respondent was working was an instrumentality of interstate commerce which was *not withdrawn from service*, but was merely undergoing roundhouse repairs incidental to its statutory boiler wash (R., 242, 245).

The majority opinion of the Court of Appeals (R., 489, 493) held in substance that the respondent was engaged in an interstate transportation plant service, and stated therefore that the respondent was "engaged in interstate transportation or in work so closely related to it as to be practically a part of it" (R., 492) and that therefore, in the opinion of the majority of the court, it was "unnecessary to determine whether at the time of the accident the locomotive being repaired had been

so withdrawn from service that it was not in use in interstate commerce."

Now, as the facts in the case bearing upon both of these propositions are entirely undisputed, it is immaterial upon which ground this court bases its ruling that the federal act applies.

The respondent contends and believes he has proved both propositions, and that the federal act is applicable, first, because at the time the plaintiff was injured he was an essential interstate transportation plant service employee engaged in work so closely related to interstate transportation as to be a part of it; and, second, because he was working on and in connection with one of the defendant's locomotives which at all times was exclusively engaged in interstate transportation, and that it was therefore an interstate transportation instrumentality, and that therefore, necessarily, the federal act applied.

Interstate commerce is never a question for the jury if the essential facts concerning employment are not in dispute, and admit no other inference. (*N. Y. C. R. R. Co.* v. *Porter*, 249 U. S. 168; *So. R. Co.* v. *Puckett*, 244 U. S. 371; *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303; *Pederson* v. *D. L. & W. R. R. Co.*, 229 U. S. 146.)

It is therefore immaterial as to what precise theory the courts below have decided that the respondent was engaged in interstate transportation or work so closely related thereto as to be a part of it, provided the respondent was so engaged at the time of his injury. (*D. L. & W. R. R. Co.* v. *Yurkonis*, 220 Fed. 429, writ of error dismissed, 238 U. S. 439.)

POINT B.

Respondent at the time of his injury was an essential interstate transportation plant service employee, and then and at all times was engaged in servicing and maintaining interstate locomotives, and thus clearly his work was an essential part of interstate transportation.

The facts establishing the above proposition are set forth in detail under the Statement of the Case and Facts in this brief, *supra.*

We may begin the consideration of the proposition stated in the above point by definitely stating some related employments which does not come within the act.

1. All railroad employes who work in general railroad repair and reconstruction shops or so-called "backshops" upon locomotives, cars and equipment or appliances, which have been in interstate transportation, *or* which have been withdrawn from interstate transportation and may or may not be returned thereto, and which are thus definitely out of service, are not engaged in interstate transportaton, and do not come under the Federal Employers' Liablity Act, *even though they are engaged in interstate commerce as distinguished from interstate transportation;* and such was the situation in the case of *Shanks* v. *D. L. & W. R. R. Co.*, 239 U. S. 556, which is cited so frequently, and which is referred to in the petitioner's brief and in the case of *C. & N. W. R. Co.* v. *Bolle*, decided by this Court November 23, 1931 and the facts in the instant case definitely show the basic and fundamental difference between the instant case and the *Shanks* case, because here, as in the *Shanks* case, this petitioner rail-

road company also maintained at Readville, Mass., a "back-shop" for general or heavy repairs and overhauling of locomotives and equipment which was definitely taken out of service to be overhauled and completely repaired, which, after being inspected, would be placed in storage before it was returned to service.

2. All employees whose usual general work is connected with interstate commerce but not interstate transportation, such as janitors and stationary engineers and fireman in station buildings, etc., are not within the scope of the federal act, even though at times, but not at the time of the injury, they may be doing work which is directly connected with interstate transportation.

Such class of employees is covered by the case of *C. & N. W. R. Co.* v. *Bolle, supra*, where Bolle was generally employed to fire a stationary engine used to generate steam for the purpose of heating the passenger depot, baggage room and other structures at a railroad station.

We think it may be positively stated that it is certain that this respondent's case does not come within either one of the above classes, but does come within that class of cases where the employee is at all times engaged in interstate transportation maintenance roundhouse work, and particularly engaged in working on interstate instrumentalities. This class of cases is typified by *New York Central Railroad Co.* v. *Marcone*, 281 U. S. 345, where the Court said:

> "Decedent was employed in the roundhouse. His duty was to fill the grease cups and pack the journal boxes of engines while in the roundhouse for inspection * * *. He worked on fourteen engines, * * *.
>
> "The engine, No. 3835, on which deceased last worked, was used in hauling interstate trains.

> It was not withdrawn from service * * *. *His presence on the premises* was so closely associated with his employment in interstate commerce as to be an incident of it as to entitle him to the benefit of the Employer's Liability Act. * * *" (Italics are respondent's).

In *Illonardo* v. *Erie R. R. Co.*, 103 N. J. Law 4, the plaintiff was employed as a laborer at defendant's roundhouse used in both interstate and intrastate commerce, and was injured while opening the roundhouse doors to allow a crippled engine to be placed therein, and the Court said:

> "A round-house is as much a part of a railroad company's plant as its ash pit (*Grybowski* v. *Erie R. R. Co.*, 88 N. J. Law, aff'd 89 id. 361) and a person whose employment requires him to assist in opening the doors of a round-house for the admission of locomotives, is as much engaged in maintaining the effectiveness of this part of the railroad company's plant, as is the man whose duties requires him to clean out the ash pit of the company, in order to maintain its effectiveness."

In *Salvo* v. *New York Central R. R. Co.*, 216 N. Y. App. Div. 592, the Court said:

> "The deceased employee was working for the New York Central Railroad Company in its round-house in the City of Rensselaer, and his employment was to clean the fire-boxes of engines. * * *
>
> "The deceased was employed, not to work upon a particular engine, but to clean the fire-boxes of engines as they were brought to the round-house indiscriminately, without regard to whether engaged in interstate or intrastate commerce * * *. His service was really a plant service. Employees of common carriers doing both interstate and intrastate commerce, whose duties are similar to those of the deceased in this case, have

been held to be engaged in interstate commerce." * * *. (See *Scelfo* v. *Buffalo, R. & P. R. Co.*, 211 A. D. 243; *Stone* v. *N. Y. C. R. R. Co.*, 211 A. D. 638, cited in this opinion.)

"Where the services are intimately related to interstate commerce and there is an element of interstate commerce in a traffic or employment it determines the remedy (*Stone* case, *supra*, citing *Phila. & Reading R. Co.* v. *Polk*, 256 U. S. 332, 334; *Erie R. R. Co.* v. *Szary*, 253 id. 86, 89). We do not think that whether or not the engine upon which the deceased was employed when he met his death had been assigned immediately to intertate commerce determines the character of his employment. He was engaged in work so directly connected with interstate commerce and so intimately related thereto and so necessary therefor as not to be distinguished therefrom."

The same conclusion we believe is properly deducible from the opinion of this Court in *Erie R. R. Co.* v. *Collins*, 253 U. S. 77, where the Court correlated the important pertinent cases previously decided upon the subject, and said at pages 82 and 85:

"It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have, on occasion, signaled the approach or departure of intrastate trains. But it is contended that when he descended from the tower and went to the pumping station he put off an interstate character and took on one of intrastate quality; or, it may be, was divested of both and sank into undesignated employment. *A rather abrupt transition it would seem at first blush, and, if of determining influence, would subject the Employers' Liability Act to rapid changes of application, plaintiff being within it at one point of time and without it at another*,—within it when on the signal tower, but without it when in the pump

> house, though in both places being concerned with trains engaged in interstate commerce." * * *
>
> * * * * * * * * *"
>
> "Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes, therefore, within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as were demanded, and the test of the cases satisfied." (Italics ours.)

In the *Collins* case, *supra*, the defendant had attempted to separate Collins' duty into two characters, one in the signal tower and the other on the way to the pump house and in the pump house, which separation the Court definitely refused to concur in.

The same general doctrine has been applied by this Court in *St. Louis R. R. Co.* v. *Seale*, 229 U. S. 156; *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170, and followed by the New York Court of Appeals in *Knowles* v. *N. Y. N. H. & H. R. R. Co.*, 223 N. Y. 513.

We therefore contend that since the respondent's general daily employment and his so-called specific employment at the time of the injury were both as an unskilled laborer at defendant's maintenance round-house in work so closely related to interstate transportation as to be a part of it that the federal act applies.

POINT C.

At the time the respondent was injured he was working on an interstate transportation instrumentality not withdrawn from service, and therefore the Federal Act applies.

We approach the consideration of this portion of the argument with the stipulated fact (R., 224-226) that engine 3221 for two years previous to the accident had been exclusively engaged in the interstate transportation of freight by the petitioner over a seventy mile branch of the defendant's railroad extending westerly from its main line in the State of Connecticut to its westerly terminal in the State of New York, and the undisputed testimony upon the trial that this particular locomotive was never used in passenger service or interstate transportation of any kind or description, even to the day of the trial, and was at the time of the injury to the respondent undergoing a statutory boiler wash and maintenance repairs which ordinarily took from three to twelve days, and were made at the defendant's Maybrook engine maintenance and service terminal, where only daily running repairs and maintenance repairs in connection with boiler washes were made on this type of engine, approximately every thirty days, and that the petitioner maintained at Readville, Mass., an out-of-service general repair shop [illegible] *where, and only where,* this particular type of locomotive was put out of service approximately every eighteen months, or after it had covered 90,000 miles of road service; there to be [illegible] and then placed in storage until such time as it would be again assigned to service. (As

to this particular locomotive there is no claim made, nor was any attempt made to show that it had ever been placed in storage when at Readville and later sent to another division of the railroad.) It is also undisputed that a little over five months previous to the date of the accident this particular locomotive had been at the general out-of-service repair shops at Readville, Mass., and had been completely overhauled and re-built, and that since such general repairs had had three boiler washes at Maybrook, after it returned to its regular run on March 27, 1929, respectively on May 3, 1929; June 10, 1929; July 17, 1929, and the one at the time of the accident when the boiler wash was begun on August 24, 1929.

A boiler wash is never made alone, but always in conjunction with temporary and running repairs, and at the time of the accident the moving of the wheels was incident to the boiler wash and incidental maintenance repairs (R., 188, 189, 264).

With this undisputed testimony it seems only necessary that we should call the Court's attention to the three applicable cases.

In *Lusk* v. *Bandy*, 76 Okla. 108, it was held that an employee making a boiler wash on a locomotive used exclusively in interstate commerce was engaged in interstate transportation at the time. How did doing work incident to the boiler wash change the character of the employment?

This Court has left the facts in each case to determine the status of the servant as to whether engaged in interstate transportation or otherwise at the time of his injury, but has declined to undertake to announce a fixed rule. (*Industrial Commission* v. *Davis*, 259 U. S. 168.)

In the last-named case Mr. Justice McKenna adds some very material things to the test heretofore laid down by this Court in the *Shanks* case, *supra*. He says:

"The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, indeed, are necessary to it, but so are all attached to the railroad company, official, clerical or mechanical. *Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees,* and the test declared, that the employee at the time of the injury must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act. *And there is a difference in the instrumentalities. In some, the tracks, bridges and roadbed and equipment in actual use, may be said to have definite character and give it to those employed upon them.* But equipment *out of use, withdrawn for repairs, may or may not partake of that character according to circumstances,* and among the circumstances *is the time taken for repairs—the duration of the withdrawal from use.* Illustrations readily occur. There may be only a placement *upon a side track or in a roundhouse*—the interruption of actual use, and the return to it, *being of varying lengths of time, or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations;* the relations of a work shop, its employments and employees having cause in the movements that constitute commerce but not being immediate to it.

"*And it is this separation that gives character to the employment, as we have said, as being in or not in commerce.* Such, we think, was the

> situation of the engine in the present case. It was placed in the *shop for general repairs* on December 19, 1918. On February 25, 1919, after work upon it, it was given a trial and it was placed in service on March 4, 1919. The accident occurred on February 1st of that year, the engine at the *time being nearly stripped and dismanteled.* 'It was not interrupted in an interstate haul to be repaired and go on.' *Minneapolis & St. Louis R. Co.* v. *Winters,* 242 U. S. 353, 356 (37 S. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54); *Chicago, K. & S. R. Co.* v. *Kindlesparker,* 246 U. S. 657 (38 S. Ct. 425, 62 L. Ed. 925)." (Italics ours.)

It seems that the Court must then have had in mind that an engine could be an instrumentality of interstate commerce, because Mr. Justice McKenna spoke of the duration of the withdrawal from actual use as a consideration, and of the character and the place of making the repairs as material. Surely a locomotive exclusively used in interstate transportation is an instrumentality of such interstate transportation. It furnishes the power by which the commerce is transported interstate. It is just as much of an interstate transportation instrumentality as a bridge or the track. The only difference is that the bridge and the track are fixed in one position. But when a railroad company purchases a special type of locomotive for its interstate transportation, and thus dedicates it to such interstate work, and thereafter uses it exclusively in interstate transportation, it necessarily is one of its prime instrumentalities of interstate transportation. Also recognition was given to the difference between running repairs of a light character made in a roundhouse and a general overhauling in a regular repair shop, where, in the first instance the engine is in the same hands as when it is on its regular run, and in the latter case

where it is placed in new hands under new control when classified and heavy repairs are to be made, thus indicating the withdrawal of the instrumentality from interstate commerce.

This *Davis* case is the last word of the Supreme Court upon the subject, where the Court has found it necessary to write an opinion, but we believe that when this Court denied certiorari in the case of *Oglesby* v. *St. L. & S. F. R. R. Co.*, 318 Mo. 79; 277 U. S. 587; No. 821 October, 1927 Term, it at least gave approval to a construction of the *Davis* case by the Missouri Supreme Court, which, if followed here (and we can see no logical reason why it should not be followed) must require the affirmance of the judgment below.

The case at bar and the *Oglesby* case are identical. In both cases it was stipulated by the attorney representing the respective railroad companies that the engine in question while in use was exclusively used in interstate tansportation. In both cases the territorial location of the place that the repairs were being made, and the regular use of the engine from that place on its regular assigned duties, prohibited anything but interstate transportation. In both cases regular "backshops" for general classified overhauling and construction repairs were maintained for that specific purpose in connection with the particular type of locomotive in question. Both locomotives were built, maintained and equipped solely for freight service of an interstate character. Both engines immediately upon the completion of the round house repairs in question went immediately back into the service from which they had been temporarily withdrawn, and in neither case did the railroad company contend that the engines were to be used for any other purpose.

Thus, the interstate transportation characteristics and the use of the instrumentalities was firmly fixed, and, therefore, the *Oglesby* case, *supra*, and the case at bar are not only identical but both are easily and definitely distinguishable from all of the cases cited and referred to by the appellant, and come completely within the test laid down by this Court in the opinion written by Mr. Justice McKenna in *Industrial Commission* v. *Davis, supra.*

We are fully aware that this Court has said in the case of *Minneapolis & St. L. R. Co.* v. *Winters*, 242 U. S. 353, that "an engine as such is not permanently devoted to any kind of traffic * * *," but we earnestly suggest that while such statement may be correct as to many locomotives used indiscriminately in both classes of commerce it certainly cannot be controlling and decisive, and undoubtedly was never intended to be controlling and decisive, of a case such as this where the evidence in the case under consideration definitely establishes by stipulation that the locomotive was never used in intrastate transportation before the accident and the railroad company makes no claim that it had ever any intention of changing the exclusive use of the locomotive in freight interstate transportation to intrastate transportation, or mixed transportation.

Therein lies the distinction between all other cases, except the *Oglesby* case, *supra*, and the case at bar; and the wisdom and practical ability of the *Oglesby* decision, we believe, were the grounds for this Court's refusing to review the Oglesby decision when the Missouri Court pointed out the justice of its decision. (See *Oglesby* v. *St. L. & S. F. R. R. Co.*, 318 Mo. 79, certiorari denied 277 U. S. 587, October Term, 1927.)

Please also see:
DAVIS VS. AKINS, 109 Kan. 474;
199 Pac. 464; cert.d'n'd;
257 U.S. 658

The petitioner continually refers in its brief to locomotive 3221 as having been withdrawn from service. There is no evidence in the recod that shows any withdrawal either by written order, or any identification on any of the daily engine movement log records found between pages 366 and 466. Whereas petitioner's locomotive inspector, Quick, testified:

> "Whenever engines of the type of 3221 were to be completely dismantled, they were taken to Reedville, and no complete dismantlings were made at Maybrook" (R., 189).

While the general foreman, Jennings, testified:

> "These repairs on 3221 were not exceptional. As a matter of fact, there were other engines in for boiler washes that are heavier" (R., 265).

Whereas, defendant's log service records, introduced by the respondent as his Exhibit 15B *at pages* 404, 406, 412, 414, *show that when engines were to be taken out of service they were marked "For shop" and this is very significant for the engines therein referred to are of the same type, and no where does it appear that when this boiler wash was commenced on August* 24, 1929, *that the defendant or any of its employees had any idea that locomotive* 3221 *was out of service.*

Conclusion.

We therefore respectfully submit that the judgment of the Court of Appeals of the State of New York should be affirmed and the writ of certiorari dismissed on either or both grounds, (1) that respondent was engaged in a plant service in work so closely connected with interstate transportation as to be a part of it, or

(2) was engaged in the performance of work on an instrumentality of interstate transportation not withdrawn from such service.

Respectfully submitted,

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